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In the

Supreme Court of the United States

October Term, 1972

Supreme Court, U.S.
FILED
OCT 16 1972
MICHAEL RODAK, JR., CLERK

WILLIAM J. RASMUSSEN, d/b/a SARIVAL GUERNSEY FARMS,

Petitioner-Appellant,

vs.

EARL L. BUTZ, Secretary of Agriculture of the United States,

Defendant-Appellee.

Claim No. 71-1691

for leave to amend pet

Motion and Supporting Affidavit to Add to the Petition for Writ of Certiorari, a Decision of the Second Circuit Court of Appeals reported after filing of the Petition.

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Supreme Court of the United States

WILLIAM J. RASMUSSEN, d/b/a
SARIVAL GUERNSEY FARMS,

Plaintiff-Appellant,

vs.

EARL L. BUTZ, Secretary of
Agriculture of the United States,

Defendant-Appellee.

Claim No. 71—1691

Motion to add to the Petition for Writ of Certiorari, a Decision of the Second Circuit Court of Appeals reported after filing of the Petition.

Now comes the petitioner, William J. Rasmussen d/b/a Sarival Guernsey Farm and moves this honorable court for an order amending the Petition for Certiorari filed herein on the 26th day of June 1972 to set forth the decision of the Second Circuit Court of Appeals in the case of *L & M Industries Inc.* vs. *Kenter*, 458 F. 2d 968, at 971, which was published after the filing of Certiorari herein.

JOHN B. CARROLL
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Syracuse, New York 13202

Supreme Court of the United States

WILLIAM J. RASMUSSEN, d/b/a
SARIVAL GUERNSEY FARMS,

Plaintiff-Appellant,

vs.

EARL L. BUTZ, Secretary of
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Defendant-Appellee.

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Affidavit of John B. Carroll in Support of Motion to Add to the Petition for Writ of Certiorari.

John B. Carroll first being duly sworn deposes and says as follows:

1. I am attorney for the petitioner herein William J. Rasmussen d/b/a Sarival Guernsey Farms.

2. That I make this affidavit in support of a motion on behalf of the petitioner for an amendment to his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to set forth a decision of the Second Circuit Court of Appeals rendered April 10, 1972 and reported in the advance sheets subsequent to the filing of the petition herein, in

which the Second Circuit adopted the rule of the District of Columbia that direct access to courts without prior exhaustion of administrative remedies, may be had where an administrative body acts outside its statutory authority (321 F. Supp. 1131, reversed 458 F. 2d 968 (2d Circuit April 10, 1972)).

3. That the petitioner wishes to amend his Petition for Writ of Certiorari to set forth the following language of the case of *L & M Industries Inc.* v. *Kenter* 458 F. 2d 968, 971 which is in conflict with the case on which certiorari is sought.

> Therefore, we find that the FDA exceeded its statutory authority when it determined Bio-Strath Exlixir to be adulterated without first providing the appellant with the opportunity to be heard on that issue. Whenever administrative action exceeds the authority delegated to it by Congress, it is appropriate for an aggrieved person to obtain judicial relief from the impingement of such excess See *Stark* v. *Wickard* 321 U.S. 288,64 S. Ct. 559, 88 L. Ed. 733 (1944); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 66 S. Ct. 637, 90 L. Ed. 718 (1946); *Carl Borchsenius Co.* v. *Gardner*, 282 F.Supp. 396 (E.D. La. (1968)).

4. The Second Circuit's decision in *Kenter* cited *Stark* v. *Wickard* (supra) a case arising under the same Act as the present case for the proposition that judicial relief is available for aggrieved parties where as here an administrative agency is challenged as exceeding its authority as delegated by Congress. However, in the instant case the Ninth Circuit narrowly interpreted the holding in *Stark* by stating that:

> *Stark* v. *Wickard*, 1944, 321 U.S. 288, on which Rasmussen relies, is not in point. There, the party regulated by the offer was a producer, for whom Congress had failed to provide an administrative remedy. In upholding judicial review, the Court relied on the fact that the statute created "definite personal rights" in producers. (321 U. S. at 309) (See Petition for Writ of Certiorari, *Kresse* v. *Hardin* No. 71-1690, Appendix B, Page 17a).

Affidavit of John B. Carroll in Support of Motion to Add to the Petition for Writ of Certiorari.

5. The Second Circuit also adopted the rule followed in the District of Columbia as set forth in the case of *Carl Borchsenius Co.* v. *Gardner* (supra), which cited *Waite* v. *Macy* 246 U.S. 606, 38 S. Ct. 395 and *Hammond* v. *Hull* 76 U. S. Appeals D.C. 301, 131 F. 2d 23.

6. Accordingly a conflict exists as to the application of decisions of the Court between the above Circuits and the Ninth Circuit on the right to direct access to the Court where the act challenged is ultra vires.

WHEREFORE, your petitioner prays for an order of the court allowing the petition for Certiorari to be amended at page 10 to set forth the aforesaid case appearing since filing of the petition and assertion of the conflict among the circuits.

JOHN B. CARROLL

Sworn to before me this
day of 1st August 1972.

ELLA W. BUTTON
Notary Public